85-1167

No.

Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAYOR'S OFFICE OF EMPLOYMENT AND TRAINING, CITY OF CHICAGO, and CITY OF CHICAGO,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether, as applied to the facts of this case, Section 106(b) of the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §816(b), which provides that the Secretary of Labor "shall" issue a final determination within 120 days of the receipt of a complaint alleging misuse of CETA funds by a grant recipient, bars the Secretary from demanding return of these funds.

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MAYOR'S OFFICE OF EMPLOYMENT AND TRAINING, CITY OF CHICAGO, and CITY OF CHICAGO,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, the Mayor's Office of Employment and Training and the City of Chicago, by their attorney, the Corporation Counsel of the City of Chicago, James D. Montgomery, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix a, *infra*) is reported at 775 F.2d 196 (7th Cir. 1985). The opinions

of the administrative law judge in the $20 million CETA grant and in the $152 million CETA grant are unpublished. These administrative orders are located in petitioners' appendix. (Appendix *infra* b, c, d, e).

JURISDICTION

The judgment and opinion of the court of appeals was entered on October 17, 1985. A petition for writ of certiorari in this case must be filed within 90 days of this date or on January 15, 1986. The jurisdiction of the United States Supreme Court is founded on 28 U.S.C. §1254(1).

RELEVANT STATUTE

§106(b) of the Comprehensive Employment and Training Act (29 U.S.C. §816(b) (Supp. II, 1978), 106(b), 92 Stat. 1907, 1926 (1978)), sets forth the statutory time frame for the issuance of the Secretary's final determination.

> **(b) Investigation of complaints by Secretary.** Whenever the Secretary receives a complaint from any interested person or organization (which has exhausted the prime sponsor's grievance system under subsection (a)(1) or which has exhausted or failed to achieve resolution of the grievance under the recipient's grievance system under subsection (a)(2) or under a collective bargaining agreement within the time limits prescribed in subsection (a)(1) or in such agreement) which alleges, or whenever the Secretary has reason to believe (because of an audit, report, on-site review,

or otherwise) that a recipient of financial assistance under this Act is failing to comply with the requirements of this Act, the regulations under this Act, or the terms of the comprehensive employment and training plan, the Secretary shall investigate the matter. The Secretary shall conduct such investigation, and make the final determination required by the following sentence regarding the truth of the allegation or belief involved, not later than 120 days after receiving the complaint. If, after such investigation, the Secretary determines that there is substantial evidence to support such allegation or belief that such a recipient is failing to comply with such requirements, the Secretary shall, after due notice and opportunity for a hearing to such recipient, determine whether such allegation or belief is true.

RELEVANT REGULATIONS

The provisions of the Code of Federal Regulations set forth below amplify the procedure to be followed in the Secretary's issuance of his "final determination" (20 C.F.R. §676.1 *et seq.* (1978)).

§676.86. Complaints and investigations at the Federal level.

(a)(1) General; final determination of substantial evidence. Where local administrative remedies have been exhausted, section 106(b) of the Act requires that a final determination of the complaint shall be made within 120 days after the Grant Officer receives the complaint. The Grant Officer's resolution pursuant to section 106(i)(1) of the Act constitutes the "final determination" required to be accomplished within the 120 days specified in section 106(b) of the Act. The final determination process consists of the non-criminal in-

vestigation, the determination of substantial evidence (either supporting or not supporting the allegations of the complaint or the belief that a recipient or subrecipient is failing to comply with the requirements of the Act or the regulations), and the procedures regarding notice, informal resolution or lack of informal resolution, and notice of opportunity for hearing contained in section 106(i) of the Act, as established in §676.88 below.

* * * * *

(c) **Investigation of complaints.** Whenever the Grant Officer receives a complaint filed in accordance with sections (a) and (b) above, the complaint shall be investigated if it alleges that any person, recipient or subrecipient is failing to comply with the requirements of the Act, regulations, grant or other agreements under the Act. Such investigation shall be completed and a conclusion made pursuant to §676.88(a) within 60 days after the filing of a complaint, or such additional time not to exceed 30 days as the Grant Officer may allow. No extensions shall relieve the Grant Officer of the duty to make his or her final determination within 120 days of the filing of the complaint.

(d) **Audit reports.** Upon receipt of a final audit report the Grant Officer will promptly transmit the audit report to the recipient and/or subrecipient for a comment period not to exceed 30 days, or for such additional time as the Grant Officer may allow. Within 30 days after the end of the comment period the Grant Officer shall make his initial determination pursuant to §676.88(a).

* * * * *

676.88(e)

(e) **Final determination.** If all the parties and the Grant Officer cannot informally resolve any matter

pursuant to paragraph (d), the Grant Officer shall, not later than 120 days after the filing of the complaint (or receipt of a final audit or investigation report in the absence of a complaint), provide each party with a final written notice in duplicate by certified mail, return receipt requested that (1) indicates that efforts to informally resolve matters contained in the initial determination pursuant to paragraph (a) have been unsuccessful, (2) lists those matters upon which the parties continue to disagree, (3) lists any sanctions, and required corrective actions, including any other alteration or modification of the plan, grant, agreement or program intended by the Grant Officer, and (4) informs the parties of their opportunity to request a hearing pursuant to these regulations. The Grant Officer shall also mail a copy of his final determinations to any parties in interest.

STATEMENT OF THE CASE

The city of Chicago has participated as a prime sponsor in CETA programs since passage of the Act in 1973.[1] The city received "prime sponsor" status in CETA programs

[1] CETA was originally enacted in 1973 as Pub.L. No. 93-203, 87 Stat. 839, as amended in 1974 by Pub.L. No. 93-567, 88 Stat. 1845, in 1976 by Pub.L. No. 94-444, 90 Stat. 1476, and in 1977 by Pub.L. No. 95-93, 91 Stat. 627, and substantially revised in 1978 by Pub.L. No. 95-524, 92 Stat. 1909. The Act was repealed, effective October 13, 1982, by §184 of the Job Training Partnership Act ("JTPA"), Pub.L. No. 97-300, 98 Stat. 1322, 1357 (1982). However, JTPA §181(e), 96 Stat. 1355, 29 U.S.C. §1591(e), provides that the new legislation "shall not affect administrative or judicial proceedings pending on [October 13, 1982], or begun between [October 13, 1982], and September 30, 1984, under [CETA]."

pursuant to §811(a)(2) of the Act which states that a prime sponsor may be "a unit of general local government which has a population of 100,000 or more . . . ." 29 U.S.C. §811(a)(2) (Supp. II, 1978).

The purpose of the Act set forth in §801 was:

> . . . to provide job training and employment opportunities for economically disadvantaged, unemployed, or underemployed persons which will result in an increase in their earned income and to assure that training and other services lead to maximum employment opportunities and enhance self-efficiency by establishing a flexible, coordinated, and decentralized system of federal, state, and local programs. (29 U.S.C. §801 (Supp. II, 1978)).

One of the city of Chicago's chief functions as a prime sponsor under CETA was to channel federal funds to numerous sub-grantees, usually and typically non-profit organizations like the Catholic Archdiocese of the city of Chicago and the Chicago Boys Club. These sub-grantees would then apply CETA funds to programs which trained, educated and/or employed those targeted for assistance under the Act, i.e. the economically disadvantaged who were unemployed or underemployed.

The two cases involved in the present proceeding involved the Department of Labor's audit review of monies received by the city's sub-grantees in 1974 and 1978-1979. The first grant expended by the city's sub-grantees amounted to approximately $20 million transmitted during the period June, 1974 through September 3, 1974. The second grant consisted of approximately $152 million which the city transmitted to its sub-grantees during the fiscal period October 1, 1978 through September 30, 1979.

A. The $20 Million CETA Grant.

The Department of Labor awarded the city of Chicago $20 million during the period from June 24, 1974 through September 3, 1974. The Secretary of Labor hired an independent accounting firm to audit this $20 million grant. The record does not disclose the exact date on which the Secretary ordered this audit, but the record does indicate that the auditing firm submitted its final audit to the Department of Labor in January of 1976. The city of Chicago received its copy of the audit on May 18, 1976. Almost five years later, on May 11, 1981, the grant officer issued his "final determination" wherein he disallowed costs of city sub-grantees in the amount of $18,458.64. Pursuant to §816(b) of the Act, the final determination should have issued 120 days after the grant officer had received this report in January of 1976. The city filed a motion requesting that the administrative law judge strike the grant officer's final determination. The city contended in this motion that because the grant officer failed to issue his final determination within the 120-day time limit, the grant officer could not enforce his order. Though the grant officer delayed five years in the issuance of his final determination, the administrative law judge denied the city's motion to strike the final determination. The Seventh Circuit affirmed this decision on October 17, 1985.

B. The $152 Million CETA Grant.

During the fiscal period dating from October 1, 1978 through September 30, 1979, the city of Chicago, as prime sponsor under the CETA Act, received approximately $152 million in federal funds. The Department of Labor requested an independent audit by an accounting firm on September 26, 1979. A preliminary audit report issued from the CPA firm on February 21, 1981, twenty-six

months later. The city of Chicago received this draft audit, was permitted pursuant to CETA regulation to respond to it, and did so. The auditing firm delivered its final audit report to the Secretary on April 30, 1982, some thirty-one months after the Secretary had initiated the audit. In sum, the Secretary took two years and seven months to complete an audit of its $152 million grant to the city. Pursuant to §816(b) of the Act, the grant officer had 120 days, from April 30, 1982 until August 27, 1982, to issue its "final determination." On October 29, 1982, sixty-three days after the 120-day statutory time frame had lapsed, and three years after the audit had been initiated, the grant officer issued his "final determination." This "final determination" disallowed costs of $13,390,613 under the terms of the grant. The city of Chicago appealed this decision to the administrative law judge of the Department of Labor on November 15, 1982. By settlement agreement, the parties determined that $3,660,478 accurately reflected funds for which the city had an inadequate record of expenditure. In this stipulation, however, the city of Chicago contested and preserved for appeal whether the Department had a right to recover this disallowed cost because of the Department's untimely issuance of its "final determination." On June 22, 1984, the administrative law judge denied the city's motion on the issue of the Secretary's untimely issuance of its decision. The Seventh Circuit affirmed this decision on October 17, 1985.

REASONS FOR GRANTING CERTIORARI

The present case eludes easy categorization as is evidenced by the conflicting statutory interpretations given §106(b) of the Act, 29 U.S.C. §816(b) (Supp. II, 1978), by four circuits across the country. On the one hand, the Third and Ninth Circuits have held §106(b) to be jurisdictional. These courts determined that because CETA's grant officer did not issue his "final determination" within 120 days of the receipt of the initial complaint, the Secretary was divested of jurisdiction under §106(b), and, therefore, barred from recovering against the alleged wrongdoer. *Lehigh Valley Manpower Program v. Donovan*, 719 F.2d 99 (3rd Cir. 1983); *City of Edmonds v. United States Department of Labor*, 749 F.2d 1419 (9th Cir. 1984) and *Pierce County v. United States*, 759 F.2d 1398 (9th Cir. 1985). On the other hand, the Second and Seventh Circuits concluded that §106(b) was not jurisdictional and, therefore, the Secretary had the authority to proceed against a party even if the grant officer failed to file his "final determination" within the 120-day statutory time frame. *St. Regis Mohawk Tribe, New York v. Brock*, 769 F.2d 37 (2nd Cir. 1985); *Milwaukee County, Wisconsin v. Donovan*, 771 F.2d 983 (1985); *Mayor's Office of Employment and Training, City of Chicago v. Department of Labor*, 775 F.2d 1976 (7th Cir. 1985). All four courts of appeals relied on a reasonable reading of §106(b) of the Act, the intent of Congress in passing the 1978 CETA Amendments, and the underlying purpose of the Act to support their opposing constructions of §106(b).[2]

[2] By its grant of certiorari in *Brock v. Pierce County*, No. 85-385, (*cert. granted* November 4, 1985), the United States Supreme

(Footnote continued on following page)

For several reasons, distinct from those already raised by the aforementioned certiorari petitions, the city of Chicago in this case seeks review in the Supreme Court. First, the city of Chicago's consolidated cases are factually distinguishable from those in *St. Regis Mohawk Tribe*, and in *Milwaukee County*.[3] The city of Chicago in both its $20 million grant and its $152 million grant acted as a conduit for these federal funds. The city did not spend these funds on city projects or city employees, nor did the city transfer these federal funds to the city's corporate account.

To the contrary, in *St. Regis Mohawk Tribe*, a tribe of Indians in Northeastern New York implemented its own training and employment program for its tribal members. The tribe never disputed the grant officer's findings that it had misused CETA funds. (*St. Regis Mohawk Tribe*, 769 F.2d at 40). Similarly, in *Milwaukee County*, the Secretary of Labor determined that the County had transferred approximately $1.2 million in CETA funds to its

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[2] *continued*
Court has recognized the importance of resolving this intercircuit conflict. Other certiorari petitions, which ask resolution of this same issue, stand in the wings. Each of them seeks a final disposition of meaning to be given §106(b) of the Act. See *St. Regis Mohawk Tribe, New York v. Brock*, 769 F.2d 37 (2nd Cir. 1985), wherein petitioner filed its certiorari petition in the United States Supreme Court on December 2, 1985 and *Milwaukee County, Wisconsin v. Donovan*, 771 F.2d 983 (7th Cir. 1985), wherein petitioner was recently granted an extension of time within which to file its certiorari petition.

[3] It is clear that the Seventh Circuit relied on both of these opinions in *Mayor's Office of Employment and Training, City of Chicago v. Department of Labor*, 775 F.2d 196 (7th Cir. 1985) to support its decision that §106(b) of the Act should not be construed to be jurisdictional.

corporate accounts. (*Milwaukee County*, 771 F.2d at 985). These facts on their face are distinct from those involving the city of Chicago's grants.

Secondly, this case is distinguishable from *St. Regis Mohawk Tribe* and *Milwaukee County* because in this case the Secretary applied its time frames and time-deadlines inflexibly vis-a-vis the city, but was lax to the point of negligence in the enforcement of these same time-frames against its own department. With respect to the $152 million grant, the facts indicate that the Department delayed 17 months in the issuance of the initial audit, 14 months in the issuance of the final audit, and 6 months in the issuance of its final determination. The city was informed definitively some three years after monies had been expended by sub-grantees that it owed the Department some $13 million in grant funds. During this same three year time frame, when the city asked for extensions of time in order to locate its sub-grantees and relevant records, the Department's response was that its time limitations were mandatory. In the $20 million grant case, the Secretary delayed more than five years from the date of its receipt of the final audit to the issuance of its final determination. Again, this delay prejudiced the city's pursuit of its grant recipients.

These factual distinctions between the city of Chicago's consolidated cases and the above-cited adverse opinions become extremely important when one looks beyond the plain meaning of §106(b) of the Act, as did the Second and Seventh Circuits, to the intent of Congress in passing the 1978 CETA Amendments and to the underlying purpose of the Act (29 U.S.C. §801 *et seq.* (Supp. II, 1978)).

Because the Second and Seventh Circuits were presented with factual situations which identified the "prime sponsor" as the "prime" spender and potential misuser of federal funds, the courts' analysis of the congressional intent in its passage of the 1978 Amendments and its analysis of the underlying purpose of the Act focused too narrowly on the "remedial" purpose of the Act. For while it is true that Congress intended some provisions of the CETA Amendments to protect against fraud, corruption, and abuse in the system, Congress never intended by passage of these same amendments to hold local taxpayers liable to the Secretary for funds which their municipality never expended and whose expenditures were only challenged by the department years after those grant monies had already been expended by private and nonprofit organizations. See S. Rep. No. 891, 95th Cong., 2d Sess. 3; 42-43 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 4480, 4522-23; H.R. Rep. No. 1124, 9th Cong., 2d Sess. 3; 5-6; 13 (1978).

Again, while one of the underlying purposes of the 1978 CETA Amendments was to enable the Secretary to ferret out fraud and abuse in CETA programs, that purpose would not be served if local governments to their prejudice were made to follow inflexible departmental time frames (as was the city in this case), while the Secretary ignored these same time frames when the Department was untimely in its investigative audits or in its final determinations. In this case, while the Secretary applied its rules rigidly against the city of Chicago, its rules were breached when applied to the Department and its subordinates. This arbitrary application of time frames and time-deadlines worked to the city's prejudice because while the Department delayed unreasonably in its pursuit of its audit reviews and final determinations, the city

lost the opportunity to investigate, in a timely and meaningful manner, the respective books and accounting procedures of its sub-grantees.

It is too easy to paint grant recipients such as the city of Chicago in a sinister light when the 1978 CETA Amendments are read too narrowly. When these amendments are read solely in the light of past abuses, the grant recipient will always be the loser, especially where the department fails to meet its own time deadlines. While one of the purposes of the CETA Amendments was surely to ferret out abuse and corruption in the system, the facts of this case do not suggest abuse and intentional misspending. See 124 Cong. Rec. 27,789; 27,233; 25,183; 25,168.

In this case there was no expenditure of funds by the prime sponsor and no question of fraud or abuse. What happened in this case was that the Department because of its unreasonable delay in auditing and review procedures unfairly prejudiced a municipality and its taxpayers. It is difficult, if not impossible, for the city to recover funds three years or five years after the city definitively learns from the Secretary that the funds have not been properly accounted for by sub-grantees. Finally, it is the local taxpayer who refills the municipal purse each year, and it is this collective taxpayer who ultimately suffers from the Secretary's failure to apply its regulations swiftly, reasonably, and evenhandedly.

The facts of this case and the Department's conduct towards its prime sponsor are cast of a different mold distinct from that of *St. Regis Mohawk Tribe*, *supra*, and *Milwaukee County*, *supra*, and deserve the consideration of this Court.

For these reasons, the city of Chicago prays that its certiorari petition be granted and that the case be set for argument with No. 85-385, *Brock v. Pierce County*.

CONCLUSION

For the reasons stated above, the petitioner respectfully requests that this Court grant certiorari in the present case and that this case be set for argument with No. 85-385, *Brock v. Pierce County.*

Respectfully submitted,

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January 8, 1986

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Appendix a

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 84-2433 & 84-3156

MAYOR'S OFFICE OF EMPLOYMENT AND TRAINING, CITY OF CHICAGO and CITY OF CHICAGO,

Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petitions for Review of Orders of the United States Department of Labor

ARGUED JUNE 11, 1985—DECIDED OCTOBER 17, 1985

Before COFFEY and EASTERBROOK, *Circuit Judges*, and GRANT, *Senior District Judge.**

COFFEY, *Circuit Judge*. The City of Chicago petitions this court to review two decisions of the administrative law judge ("ALJ") concerning the failure of the Department of Labor ("DOL") to comply with the 120-day time limit set forth in 29 U.S.C. § 816(b). In both of his decisions, the ALJ determined that the failure of the DOL to render its "final determination" within the 120-day time limit did not constitute a jurisdictional bar. Thus, the DOL

* The Honorable Robert A. Grant, Senior District Judge of the Northern District of Indiana, is sitting by designation.

was not prevented from disallowing claims made by the City of Chicago for reimbursement of funds under Comprehensive Employment Training Act ("CETA"). We dismiss the City's petition for review.

I

Both cases arise from a financial and compliance audit of CETA grants awarded to the City of Chicago by the DOL. Under the grant procedure the DOL awards the City funds for various CETA projects and after a period of time it conducts an audit to ascertain if the City's expenditures of the funds were in compliance with CETA guidelines.

A. *Case No. 84-2433*

During the period from October 1, 1978 through September 30, 1979, the DOL, through its private auditors, conducted an audit covering approximately $152 million of grants received by the City of Chicago from the CETA program. The auditor's draft report recommended that approximately $5.3 million of the CETA funds spent by the City of Chicago be disallowed; and in addition, another $11.4 million in costs be questioned.[1] The DOL grant officer received the final audit report from the private accounting firm on April 30, 1982. Pursuant to section 106(b) of CETA, 29 U.S.C. § 816(b), the DOL had 120 days from that date to make its "final determination" of whether

[1] Of the $11.4 million, approximately $11 million involved prior sub-grantee audits in which the City had failed to resolve previously questioned expenditures. Under the CETA provisions, the City was required to arrange for audits of its sub-grantees, organizations and agencies receiving CETA funds directly from the City, and promptly resolve any discrepancies discovered by these audits by either approving or disallowing the claims submitted to the DOL. *See* 41 C.F.R. § 29-70. By the time the auditing firm the DOL hired completed the audit of the City in 1981, the City failed to resolve approximately $11 million of the claims in the sub-grantee's audits.

or not to disallow the City's expenditures. Title 29 U.S.C. § 816(b) provides:

> "Whenever the Secretary receives a complaint from any interested person or organization . . . which alleges, or whenever the Secretary has reason to believe . . . that a recipient of financial assistance under this Act is failing to comply with the requirements of this Act, the regulations under this Act or the terms of the comprehensive employment and training plan, the Secretary shall investigate the matter. The Secretary shall conduct such investigation, *and make the final determination required by the following sentence regarding the truth of the allegation or belief involved, no later than 120 days after receiving the complaint.* If, after such investigation, the Secretary determines that there is substantial evidence to support such allegation or belief that such a recipient is failing to comply with such requirements, the Secretary shall, after due notice and opportunity for a hearing to such recipient, determine whether such allegation or belief is true." (emphasis added).

Between April 30 and October 29, 1982, the date the grant officer issued his final determination, the DOL and the City engaged in informal negotiations to resolve the sub-grantee audit findings pursuant to 20 C.F.R. 676.88(d).[2] The grant officer issued his initial determination on August 26, 1982, within the 120-day period, the 120 days expiring on August 27, 1982, and provisionally disallowed $11 million of the questioned $11.4 million expenditures relating to the unresolved sub-grantee audits. On October 29, 1982, the grant officer issued his final determination

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[2] 20 C.F.R. 676.88(d) provides for informal resolution of any complaint prior to the grant officer making his final determination: "The Grant Officer shall not revoke a recipient's grant, in whole or in part, nor institute corrective actions or sanctions against a recipient without first providing the recipient with an opportunity to informally resolve those matters contained in the Grant Officer's initial determination."

and refused to approve approximately $13.3 million of the City's expenditures; this amount consisted of $3.3 million in expenditures the auditors originally recommended be rejected and $11 million relating to the sub-grantee audits. Over the next few years, the City and the DOL continued to engage in informal negotiations finally culminating in a stipulation reciting that the City owed the DOL approximately $3.6 million. On June 22, 1984, the administrative law judge approved the stipulation, but denied the City's motion to strike and dismiss the grant officer's final determination for failure to observe the 120-day statutory time limit set forth in 29 U.S.C. § 816(b).

B. *Case No. 84-3156*

During the period from June 24, 1974 through September 3, 1974, the city also was awarded approximately $20 million in CETA grants. After reviewing the City's records, the DOL auditors determined that $80,000 of the $20 million grant was spent improperly by the City. The final report of the auditor was filed in January, 1976, and the grant officer issued his initial determination on March 20, 1981, finding that the City owed the DOL $50,000 for misspent CETA funds.[3] Between March 30 and May 11, 1981, the DOL and the City were partially successful in their efforts to reach an informal resolution concerning the contested expenditures. Thus, on May 11, 1981, the grant officer issued his final determination directing the City to repay approximately $18,000 of the disallowed expenditures. The City once more filed a motion with the administrative law judge requesting that he strike the grant officer's final determination as the DOL did not have jurisdiction since the grant officer failed to issue his

[3] As part of his explanation for the delay, the grant officer noted in his final determination that much of the delay was attributable to the parties' poor understanding of the "proper resolution techniques." Further, as discussed later in this opinion, the DOL was facing a large backlog of cases during the mid and late 1970's which may have, in part, caused the delay.

final determination within the 120-day limit after receipt of the final audit report; however, the administrative law judge denied the City's motion to strike the final determination.[4]

The issue presented to this court is whether the DOL's failure to issue its final determination within the 120-day period set forth in section 106(b) of CETA, 29 U.S.C. § 816(b), prevents the DOL from ordering the repayment of the disallowed expenditures.

II

Essentially, the City's position is that the Secretary's failure to act within 120 days from receipt of the auditor's report bars the Secretary from taking any action to collect misspent CETA funds. As of this date, two federal circuit court of appeals have endorsed such a position having held that the Secretary's failure to act within 120 days bars him from taking any action against CETA recipients. *See Lehigh Valley Manpower Program v. Donovan*, 718 F.2d 99 (3d Cir. 1983); *City of Edmonds v. United States Dep't of Labor*, 749 F.2d 1419 (9th Cir. 1984). However, this circuit and the Second Circuit have rejected this position. *See Milwaukee County v. William E. Brock, Secretary of Labor*, No. 84-1067, slip op. at 3-14 (7th Cir. August 6, 1985); *St. Regis Mohawk Tribe, New York v. Brock*, 769 F.2d 37 (2d Cir. 1985).

A review of the legislative history including the circumstances surrounding the enactment of the 120-day provision contained in section 816(b) demonstrates that Congress did not intend for the 120-day time period to act as a jurisdictional bar. In 1978, Congress amended the CETA statutes, along with adding the 120-day time period to section 816(b), as Congress was concerned with the

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[4] At oral argument, the DOL conceded the second case (No. 84-3156) became subject to the 120-day limit in 1978 when section 816(b) was amended.

reported fraud and waste and suspected abuses in the CETA program. *See, e.g.*, 18 U.S.C. § 665 (Supp. V 1982) (authority to take action against recipients, including criminal sanctions); 29 U.S.C. § 816(d) (clarifying Secretary's authority to order repayment for misspent funds); 29 U.S.C. § 836 (authority to terminate grants in emergency situation); 29 U.S.C. § 816(f) (authority to issue regulations against nepotism, kickbacks, and conflicts of interests). Congress granted the Secretary this increased enforcement power over the CETA program in order that he might have greater authority as well as responsibility to detect and remedy the problems and abuses inherent in the program. *See* S. Rep. No. 891, 95th Cong., 2d Sess. 42-43 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 4480, 4522-23; *see also* 124 Cong. Rec. 25182 (1978) (remarks of Rep. Lehman). At the time Congress was enacting these provisions giving the Secretary greater enforcement power and authority to deal with abuses in the CETA program, Congress was also well aware that the DOL faced a substantial backlog of CETA cases caused by a shortage of DOL personnel. *See* H.R. Rep. No. 1124, 95th Cong., 2d Sess. 3, 5-6, 13; *see also* 124 Cong. Rec. 31,021 (1978) (remarks of Rep. Maguire); *id.* at 31,026 (remarks of Rep. Collins). Thus, since Congress was well-aware at this time of the already burdensome workload facing the Secretary that was caused by the shortage of personnel and was cognizant that it would be adding to this burdensome workload by increasing his responsibility as well as his investigative and enforcement power to detect and remedy abuses in the CETA program, it would be illogical for Congress to grant the Secretary greater increased responsibilities to detect abuses and at the same time impose a jurisdictional bar against the recovery of misappropriated funds by the Secretary only 120 days after reception of the complaint.

Further, the remarks of Congressman Obey, a sponsor of the 1978 amendment to section 816(b) providing for the 120-day time period, are helpful in our analysis of this question and support the DOL's position that failure by the

Secretary to act within this period does not deprive the Secretary of jurisdiction to resolve any disputed matter. In proposing the amendment to section 816(b), Congressman Obey engaged in the following discussion on the House floor:

"Mr. Obey: Mr. Chairman, I understand this amendment will be accepted by the Committee. It is a very simple amendment. All it does is put a specific period of time in the bill during which the prime sponsor must answer a complaint lodged against it for violations of the conditions under which the CETA program exists in the first place, and also it establishes a 120-day time limit on the time during which the Labor Department can consider a complaint before it has to proceed.

. . . .

Mr. Hawkins: Mr. Chairman, we have seen the amendment, we accept the amendment.

If [Mr. Obey] would further yield, *do I understand from [him] that if the determination is not made in a specified time it shall not effect the Secretary's jurisdiction in the matter*?

Mr. Obey: *That is correct.*

Mr. Hawkins: *With that understanding we do accept the amendment.*"

124 Cong. Rec. 25230-31 (1978) (emphasis added). We realize that "the remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). The careful review of the legislative history of an act of Congress must include both the entire record of the hearings and any other amendments contained in the legislative

package to gain a proper understanding of Congress's intent. In this case when viewed in conjunction with the other 1978 amendments to the CETA program, Congressman Obey's remarks are consistent with Congress's increased concern over the detection of fraud, waste and abuse in the CETA program as the purpose of the 120-day provision was to act only as an incentive to accelerate the review of complaints received by the Secretary. "The 120 day deadline . . . originated as part of a provision whose purpose was to benefit the victims of prime sponsor non-compliance with CETA . . . It was not designed to give prime sponsors immunity for misuse of CETA funds unless there was a final determination within 120 days." *St. Regis Mohawk Tribe, New York*, 769 F.2d at 44, citing S. Rep. No. 891 95th Cong., 2d Sess. 15-16, 42-43 (1978) *reprinted in* 1978 U.S. Code Cong. & Ad. News at 4496, 4522-23. Given Congress's concern over the detection and reporting of CETA program abuses it is obvious that Congress did not intend the 120-day provision to act as a jurisdictional bar, and thus create a loophole allowing misappropriated CETA funds to continue to be held illegally by CETA recipients.

The purpose of the 1978 CETA amendments was to give the Secretary greater responsibility to insure increased accountability for the CETA funds; however, preventing the Secretary from pursuing his action against the CETA recipients where the Secretary fails to act within 120 days from the time of receiving the complaint (or final audit) would defeat the very purpose of these CETA amendments by stripping the Secretary of his power to act. Because of the complexity of the issues and the amount of material that must be reviewed and analyzed, more often than not more than 120 days is required for the Secretary to undertake a thorough and complete investigation of the facts, figures and data involved in a matter submitted for review. As an example, the first case in this appeal involved an audit of some 152 million dollars of CETA funds

and concerned millions of dollars of contested costs.[5] Under these circumstances, it would be foolhardy to assume that a single grant officer could properly and thoroughly examine and digest the audit report of an accounting firm, which employed a number of people and spent considerable hours analyzing the City's complex records, and make his recommendation within 120 days, unless one assumes that the grant officer is to merely cast aside his responsibility and mandates of his oath of office and rubber stamp the audit report's recommendation. Certainly, to read section 816(b) as barring the Secretary from disallowing CETA fund claims when he fails to issue his "final determination" within 120 days from the time the complaint was received in his office would be inconsistent with the clear and explicit intent of Congress that the Secretary assure that the federal taxpayers' hard-earned tax dollars are properly utilized by CETA recipients within the Congressional guidelines. To adopt any other position would impede the Secretary's efforts to recover those funds that were either misappropriated by CETA recipients or gained through schemes designed to defraud the government (and thus the taxpayers) and thus would frustrate Congress's intent to grant the Secretary increased responsibilities and enforcement power to detect and correct abuses in the CETA program.

To support its argument that the 120-day limit set forth in 29 U.S.C. § 816(b) acts as a jurisdictional bar to any action taken by the Secretary after this time, the City cites *Lehigh Valley Manpower Program v. Donovan*, 718 F.2d 99 (3d Cir. 1983) and *City of Edmonds v. United*

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[5] At the same time it took over one year of negotiations between the DOL and the City to resolve the dispute over the amounts owed to the government. If it took over one year of negotiations to determine the proper amount of money due the government, it would be unreasonable to expect a grant officer to come to a proper and accurate determination when using accepted accounting and business review procedures of the amount the City owed within only 120 days.

States Department of Labor, 749 F.2d 1419 (9th Cir. 1984)[6] which held that the failure of the Secretary to act within 120 days as provided in 816(b) deprived the Secretary of jurisdiction. The *Lehigh* decision does not persuade us that Congress meant to erect a jurisdictional bar to actions taken by the Secretary after the 120-day period as *Lehigh* failed to examine and legally analyze the legislative history or the general purpose behind the 1978 CETA amendments in reaching its conclusion that failure to act within the 120-day period deprived the Secretary of the power to challenge the alleged CETA violations. While *City of Edmonds* did examine the legislative remarks (particularly the remarks of Congressman Obey) concerning the passage of the 120-day time period, that decision failed to consider the result that if this section was read to impose a jurisdictional bar Congress's intent in amending the CETA statutes to provide the Secretary with greater power to detect and remedy CETA program abuses would be frustrated. Further, the Ninth Circuit improperly relied upon the Supreme Court's decision in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980) to support its position that the use of the term "shall" in 29 U.S.C. § 816(b) required that the Secretary act within the 120-day time limit, or lose his jurisdiction. *Mohasco* is inapposite since it involved an individual who suffered the consequences of his *own* delay in filing his action; in our case, the interests of the taxpaying public are at stake and to impose a jurisdictional bar for actions taken after 120 days would be to sacrifice their interests. *See St. Regis Mohawk Tribe, New York*, 769 F.2d at 46.

The City finally argues that since the Supreme Court in *United States v. Locke*, 53 U.S.L.W. 4433, 4438 (April 2, 1985) expressed the view that "if the concept of a fil-

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[6] Recently, the Ninth Circuit, in *Pierce County v. United States Department of Labor*, 659 F.2d 1398 (9th Cir. 1985) (involving failure of Secretary to act within 120 days after receiving final audit report of CETA funds), followed its decision in *City of Edmonds*.

ing deadline is to have any content, the deadline must be enforced,"[7] we must strictly construe section 816(b) in order for the deadline imposed by Congress to have any meaning. However, the *Locke* decision is not in point as the statute at issue in *Locke* expressly provided that failure to file a timely claim would "constitute an abandonment of the claim." While Section 816(b) requires the Secretary to act within 120 days, section 816(b)'s language and the 1978 CETA amendments' legislative history fail to specify any sanction if the Secretary fails to act within the proscribed time period. The well-recognized rule is that a statutory time period does not erect a jurisdictional bar to actions taken subsequent to that period unless the statute also specifies the sanction for failing to comply with the deadline. *See, e.g., St. Regis Tribe, New York*, 769 F.2d at 41; *Thomas v. Barry*, 729 F.2d 1469, 1470 n.5 (D.C. Cir. 1984); *Usery v. Whitin Machine Works, Inc.*, 554 F.2d 498, 501 (1st Cir. 1977). Indeed, the Secretary argues in his brief that section 816 does not create a jurisdictional bar, rather, as interpreted by the DOL, section 816(b) (and 20 C.F.R. § 676.88(e)) create "the right in a party to compel the Department to act promptly, not avoid action altogether," (DOL's brief at 21); and thus section 816(b) provides a party with the right to compel the Department to complete its investigation forthwith if at all possible within 120 days, or to proceed to an administrative hearing before an ALJ. As previously discussed, we are convinced that Congress never contemplated, when it imposed the 120-day period, barring the Secretary from recovering monies illegally gained through fraud, deception or misappropriation. Rather, in view of the fact that Congress was aware of the large backlog

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[7] In *Locke*, the statute in question was section 314 of the Federal Land Policy and Management Act ("FLPMA") providing that mining claims located prior to FLPMA's enactment in 1976 must be recorded with the Bureau of Land Management within 3 years of Act's enactment and prior to December 31 of every year thereafter.

of cases and the Secretary's increased responsibility to detect fraud and waste with the already undermanned staff, it is clear that Congress intended the 120-day period merely to act as spur to accelerate the resolution of the myriad of complaints filed with the DOL, while mandating that the Secretary continue to apply proper business investigative and evaluation techniques, in an attempt to recover misappropriated funds. *See St. Regis Mohawk Tribe, New York*, 769 F.2d at 44, citing S. Rep. No. 891 95th Cong., 2d Sess. at 15-16, 42-43, 80, 1978 U.S. Code Cong. & Ad. News at 4495, 4522-23, 4560. Thus, if the DOL fails to act within the 120-day time limit the case should proceed to the ALJ who is to make his judgment without the benefit of the DOL.

In summation, we conclude that the imposition of a jurisdictional bar where the Secretary had failed to act within the 120 days set forth in 29 U.S.C. § 816(b) would be inconsistent with the legislative history and remedial purpose of the 1978 CETA amendments. Accordingly we dismiss the City's petition to review the orders of the administrative law judge.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Appendix b

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

U.S. DEPARTMENT OF LABOR

v. Case No. 83-CTA-91

EMPLOYMENT AND TRAINING,
CITY OF CHICAGO

ORDER

This Order summarizes the results of a telephone conference call between the undersigned and counsel for all parties on April 27, 1984. The City of Chicago moved to dismiss its request for a formal hearing based upon the settlement terms upon which it had reached agreement with the U.S. Department of Labor. The motion was granted. In addition, the City of Chicago moved to have all of the costs disallowed by the Grant Officer in this matter allowed on the ground that the Department of Labor had not acted within the 120 day period afforded it by the Comprehensive Employment and Training Act. It was further agreed and it is hereby ordered that written motions will be filed by May 1, 1984, all parties will have through May 15, 1984 within which to brief issues raised by the motion, and, further, that any reply briefs will be filed by May 22, 1984.

Dated: 3 MAY 1984
Washington, D.C.

/s/ Charles P. Rippey
Administrative Law Judge

CPR/pac

Appendix c

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

U.S. DEPARTMENT OF LABOR

v. Case No. 83-CTA-91

EMPLOYMENT AND TRAINING,
CITY OF CHICAGO

FINAL ORDER

The City of Chicago's Motion to Strike and Dismiss the Final Findings and Determinations of the Grant Officer in this matter is hereby denied.

The motion of the City of Chicago to dismiss its request for a formal hearing based upon the settlement terms upon which it has agreed to with the U.S. Department of Labor is hereby granted. This Motion to Dismiss is the motion made during the telephone conference call on April 27, 1984, and referred to in the Order entered in this matter on May 3, 1984.

/s/ Charles P. Rippey
Administrative Law Judge

Dated: 22 JUN 1984
Washington, D.C.

CPR/pac

Appendix d

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

DEPARTMENT OF LABOR

v. Case No. 83-CTA-313

CHICAGO MAYOR'S OFFICE OF
EMPLOYMENT AND TRAINING

ORDER DENYING PETITIONER'S MOTION TO STRIKE AND DISMISS FINAL FINDINGS AND DETERMINATIONS OF GRANT OFFICER

Petitioner's Motion to Strike and Dismiss Final Findings and Determinations of Grant Officer is hereby denied.

Scheduling of the hearing in this matter will be the subject of a future Notice. Counsel are requested to consult with each other and suggest dates which will not conflict with prior commitments and attempt to agree on the amount of hearing time which will be required in order to elicit testimony regarding any issues which it appears will remain unresolved at the time of the hearing. Information regarding these subjects should be communicated to the undersigned by November 15, 1984.

/s/ Charles P. Rippey
Administrative Law Judge

Dated: 29 OCT 1984
Washington, D.C.

Appendix e

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of

UNITED STATES DEPARTMENT
OF LABOR

Respondent

v. Case No. 83-CTA-313

CHICAGO MAYOR'S OFFICE OF
EMPLOYMENT AND TRAINING

Complainant

Leonard Borden, Esquire
For the Respondent

Marianne Parrillo, Esquire
For the Complainant

Before: CHARLES P. RIPPEY
Administrative Law Judge

DECISION AND ORDER

This matter arises from the request by the Chicago Mayor's Office of Employment and Training for a formal hearing on the final determinations of the Grant Officer on audit report No. 05-6-492-C-459-001 which relates to Grant No. 17-4001-32 under the Comprehensive Employment and Training Act, 29 U.S.C. 801 *et seq.*, hereafter referred to as the Act.

A hearing in this matter was held on October 9, 1984 in Chicago, Illinois at which both parties were represented by counsel. At the hearing testimony was presented and argument heard on the Petitioner's Motion to Strike and Dismiss the Final Findings of the Grant Officer. An Order denying the Motion was issued on October 29, 1984.

Both parties have advised that they do not wish to present any evidence or argument on the substance of the Grant Officer's final determination in this case.

The Respondent having presented no evidence or argument as to why the final determinations of the Grant Officer were improper or not supported by substantial evidence, and it appearing that the final determinations are supported by evidence contained in the Administrative File which forms a part of the record in this case, the Final Determination issued by the Grant Officer on May 11, 1981 in which he disallowed $18,458.64 is hereby adopted and affirmed.

This order shall become the final order of the Secretary of Labor, United States Department of Labor, unless the Secretary modifies or vacates this Order within the 30 days after it is served.

/s/ Charles P. Rippey
Administrative Law Judge

Dated: 20 NOV 1984
Washington, D.C.